AZIMUDDIN AB GHANI A

v.

KUMPULAN WANG SIMPANAN PEKERJA

HIGH COURT MALAYA, KUALA LUMPUR B
NALLINI PATHMANATHAN J
[BANKRUPTCY NO: D-29-1068-2008]
8 MARCH 2010

BANKRUPTCY: *Bankruptcy notice - Substituted service - Setting aside substituted service of bankruptcy notice - Whether irregularities in substituted service of bankruptcy notice - Whether judgment creditor had substantively complied with letter and spirit of Practice Direction No. 1 of 1968 - Whether service of bankruptcy notice on a Saturday renders service bad or flawed - Whether genuine attempts made to locate judgment debtor prior to effecting substituted service - Whether use of photocopy of sealed order for substituted service when effecting substituted service renders service null and void - Bankruptcy Act 1967, s. 131* C D

BANKRUPTCY: *Practice and procedure - Substituted service - Alleged irregularities in substituted service of bankruptcy notice - Whether judgment creditor had substantively complied with letter and spirit of Practice Direction No. 1 of 1968 - Whether service of bankruptcy notice on a Saturday renders service bad or flawed - Whether genuine attempts made to locate judgment debtor prior to effecting substituted service - Whether use of photocopy of sealed order for substituted service when effecting substituted service renders service null and void - Bankruptcy Act 1967, s. 131* E F

CIVIL PROCEDURE: *Affidavits - Deponent of affidavits - Application to cross examine - Whether allowed - Whether contradiction shown on sworn evidence before court, warranting cross-examination* G

The judgment debtor ('JD') sought the following orders in this application: (i) to cross-examine the deponent of the affidavit in support of the JC's application for substituted service ("the said affidavit"); and (ii) to set aside the order for substituted service of the bankruptcy notice ("the said order"). The grounds for the JD's application were as follows: (a) that the contents of the said affidavit affirmed by one Arman were untrue; (b) that there was non-compliance with Practice Direction No. 1 of 1968 ("the PD") in relation to the requirements to be adhered to prior to making an application for substituted service; (c) that the judgment creditor ("JC") had failed to make attempts to contact the JD at his place of work or business address; and (d) that the sealed copy of the said order was not posted on the notice board in court or at the H I

JD's last known address; instead a photocopy of the sealed copy of the said order was so served. In the said affidavit, Arman had stated that he attended the premises on 3 May 2008 and met a Malay man who advised him that the JD had long since moved out and that his driver occasionally came by to collect his letters. Arman then affirmed that after issuing a letter of appointment prior to the second visit, he went to the premises on a Saturday when he met up with a 'Linda' who told him that the JD had moved to Taman Tun Dr. Ismail. She refused to give him the new address. The JD disputed these facts claiming that such an episode could not have occurred.

Held (dismissing application):

(1) The JD made bare assertions that the sworn statement of the process server was untrue, but without providing any basis for such allegations. If the JD had no contact with this address, how then was he able to say that the facts affirmed by Arman were untrue. There was no basis for the JD's allegations of untruth. This was insufficient to justify a conclusion that there was a contradiction shown on the sworn evidence before the court, warranting cross-examination. (para 8)

(2) There was substantive compliance with the letter and spirit of the PD. The fact that the visit was on a Saturday in itself was insufficient to warrant a finding that there was non-compliance as would render the attempts to effect service bad or flawed. The spirit of the PD is to ensure that genuine attempts are made to locate the JD prior to effecting substituted service. This appeared to have been done. (paras 12 & 13)

(3) The attempts at service by the JC were reasonable in all the circumstances of the case. The fact that the JC through its solicitors had previously succeeded in serving the summons at that particular address, coupled with the Form 49 which showed the same address for the JD, amounted to sufficient basis for the attempts at service at that address. (paras 18 & 19)

(4) The said order itself did not prescribe that a sealed copy of the order was to be annexed to the bankruptcy notice for purposes of effecting substituted service. Therefore, there had been no contravention or failure to comply with the terms of that order. (para 23)

(5) In any event, the use of a photocopy of the sealed order for substituted service rather than the actual sealed order merely amounts to an irregularity. It does not render the proceedings

a nullity. There was no evidence of any substantial injustice caused by the annexation of a photocopy of the sealed order rather than the sealed order itself. The JD was in no way misled or prejudiced. Pursuant to s. 131 of the Bankruptcy Act, the 'irregularity' did not invalidate service of the bankruptcy notice. (para 24)

(6) The lack of a sealed copy of the notice being annexed to the affidavit of service did not result in the JD being prejudiced in any manner, given the identical nature of the photocopy annexed to the affidavit of service. Moreover the affidavit of service is filed in court to prove service, and not for purposes of advising the JD of the proceedings. Therefore, the error of the JC in annexing a photocopy rather than a sealed copy in the affidavit of service merely amounted to an irregularity under s. 131 of the Bankruptcy Act which did not invalidate the service of the bankruptcy notice. (paras 29 & 30)

Case(s) referred to:
Affin Bank Bhd v. Major Galaxy Sdn Bhd & Ors [2006] 5 CLJ 73 HC ***(refd)***
Au-Yong v. Dicum & Anor [1963] 1 LNS 7 HC ***(refd)***
Koh Thong Kuang v. United Malayan Banking Corporation Berhad [1994] 4 CLJ 488 SC ***(refd)***
Raman Chettiar v. Ledchumanan Chettiar [1938] 1 LNS 60 HC ***(refd)***
Re Kamarul Ariffin Mohd Khaidzir ex p Majlis Amanah Rakyat [2002] 8 CLJ 905 HC ***(refd)***

Legislation referred to:
Bankruptcy Act 1967, s. 131
Bankruptcy Enactment, s. 123
Bankruptcy Rules 1969, rr. 91, 97, 110, 111

For the judgment debtor - Siva Sankar; M/s Sankar & Co
For the judgment creditor - Azrul Fazli Ahmad Samsuri; M/s Azrul Afifi & Azwan

Reported by Amutha Suppayah

JUDGMENT

Nallini Pathmanathan J:

[1] The judgment debtor, Azimuddin bin Ab Ghani ('the JD') seeks to:

(i) Cross-examine the deponent of the affidavit in support of the JC's application for substituted service; and

(ii) To set aside the order of this court dated 19 June 2008 for substituted service of the bankruptcy notice (dated 16 April 2008) on the following grounds:

(a) The contents of the affidavit in support of the application for substituted service of the bankruptcy notice by one Arman bin Mohammed Roji dated 13 June 2008 are untrue. Therefore cross-examination is sought;

[2] With regards to the setting aside of the order of court dated 19 June 2008, the grounds are:

(b) There was non-compliance with Practice Direction No. 1 of 1968 in relation to the requirements to be adhered to prior to making an application for substituted service;

(c) The judgment creditor, Lembaga Kumpulan Wang Simpanan Pekerja ('the JC') had failed to make attempts to contact the JD at his place of work or business address;

(d) The sealed copy of the order for substituted service was not posted on the notice board in court or at the JD's last known address; instead a photocopy of the sealed copy of the order was so served. This the JD contends amounts to an irregularity/flaw that is fatal;

[3] Each of these grounds will be considered in turn.

Ground (a): Untrue Contents Of The Affidavit In Support Of The Application For Substituted Service, Warranting Cross-examination

[4] In his affidavit in support of the application for substituted service of the bankruptcy notice, the said Arman stated that he entered the premises on 3 May 2008 and met a Malay man. The JD contends that no 'Malay man' would have been present there during the daytime; that after issuing a letter of appointment prior to the second visit, the process server entered the premises on a Saturday, in breach of the Practice Direction which requires that any such visit be made on a working day. Finally the process server averred that he met up with a 'Linda' who told him that the JD had moved to Taman Tun Dr. Ismail. This too the JD strongly disputes maintaining that such an episode could not have occurred.

[5] In this context the JD sought to have the process server cross-examined maintaining that this was necessary to ascertain whether he was indeed telling the truth about his attempts to serve the Bankruptcy notice. It is pertinent that the process server prior to trying service was instructed that the JD's last known address was

No. 2, Lorong Kiri 7, Datuk Keramat 54000 Kuala Lumpur. This then explains why service was sought to be effected at this address. He then explains that on the morning of 3 May 2008 he went to this address to serve the bankruptcy notice. He met a Malay gentleman who advised him that the JD had long since moved out and that his driver occasionally came by to collect his letters.

[6] Accordingly the process server then sent a letter dated 14 May 2008 by registered post to the JC to make an appointment. The appointment was duly set for a Saturday, 31 May 2008 at 9.30am for the purposes of service of the bankruptcy notice. On this particular date, he claims to have met a Ms. Linda who told him that the JD had moved to Taman Tun Dr. Ismail. However she refused to give him an address at that location. The process server then supplied her with the details of his employers, the firm of Messrs Azrul Afifi & Azuan. However nothing was heard from the JD, necessitating this application.

[7] In view of the fact that the JD disputes the chronology set out by the process server, does this in itself warrant an order entitling the JD to cross-examine the process server in respect of his attempts at service?

[8] A close perusal of the JD's contentions will show that he makes bare assertions that the sworn statement of the process server is untrue, but without providing any basis for such allegations. In other words the JD provides no factual basis to refute the sworn statement of the process-server. The JD contends that no 'Malay man' could have been living at the address visited by the JD. On what basis and how does the JD know this, if indeed he really does not live at that address? Further the process server particularized his conversation with the Malay man, stating that he was advised that the JD had moved out but that his driver still collected mail from there. On what basis does the JD maintain that this is completely untrue?

[9] The JD also claims that there was no person called Linda who advised the process-server that he had moved to Taman Tun Dr. Ismail. Again if he had no contact with this address, then how would he be able to raise these facts? If on the other hand he did have contact with this address then he knew or ought to have known that attempts were being made to serve him with legal process, but that he chose to ignore the same. Taken as a whole, it appears that in order to make the allegation that the process server is not telling the truth, the JD would have to have knowledge of the address at which the bankruptcy notice was sought to be served.

[10] There appears to be no basis for his allegations of untruth. This in itself is insufficient to justify this court concluding that there is a contradiction shown on the sworn evidence before it, warranting cross-examination. It is insufficient to simply deny the process-server's detailed allegations and then contend that there is a contradiction warranting cross-examination. The onus remains on the JD to show some tangible evidence of untruth in relation to the process server's affidavit. As he has failed to satisfy this onus, no 'contradiction' is apparent. Accordingly no leave to cross-examine is necessary. I accordingly dismissed the JD's appeal against the decision of the SAR dismissing the application for leave to cross-examine.

[11] The rest of the grounds deal with the application to set aside the order for substituted service dated 19 June 2008.

Ground (b): Non-compliance With Practice Direction No. 1 Of 1968

[12] The complaint is that the visit was scheduled for a Saturday and not a working day, in breach of the PD. A consideration of the full facts of this case disclose that there was substantive compliance with the letter and spirit of the PD. A letter was sent as required to the correct address. It was not returned. The two visits were made as required. Given these matters, the fact that the visit was on a Saturday in itself is insufficient, in the context of this factual matrix to warrant a finding that there was such non-compliance as would render the attempts to effect service bad or flawed.

[13] Further the spirit of the Practice Direction is to ensure that genuine attempts are made to locate the JD prior to effecting substituted service. This appears to have been done. The JD contends that as there has been a breach of the provisions of the PD, this in itself validates the entire order for substituted service. On a consideration of the facts relating to the attempts to effect service substantially in compliance with the PD, it appears to this court that on the facts of this particular case as set out above, the spirit and intent of the PD have been complied with. In the case of *Affin Bank Bhd v. Major Galaxy Sdn Bhd & Ors* [2006] 5 CLJ 73, Vincent Ng J had occasion to refer to the application of this Practice Direction. Referring to the Supreme Court decision of *Koh Thong Kuang v. United Malayan Banking Corporation Berhad* [1994] 4 CLJ 488 His Lordship exhorted parties to pay heed to the statements of the Supreme Court in relation to this Practice Direction:- "... This demonstrates the efficacy of the SS procedures provided by the rules and streamlined as it were by Practice note No. 1 of 1968 which we would exhort should be applied not blindly but *mutatis mutandis* the facts of each situation ..."

[14] Vincent Ng J. went on to make the following comments in relation to service of process which is highly relevant and which I respectfully adopt: A

> ... On the perennial issue of service of process I would make the following comments. Bearing in mind that the whole purpose of the need for service of process upon the opposite party is to ensure that he is aware of the process or proceedings against him, and as we have now arrived at the era of communications and transactions through the electronic media, for example e-mail, facsimile, multimedia messaging services, E-Syariah, and video conferencing it is in my opinion, high time that we heed the prescient exhortation of the Supreme Court in Koh Thong Kuan that Practice Note No. 1 of 1968 "should not be applied blindly but *mutatis mutandis* the facts of each situation" and consider an update of this Practice Note. My further view is tha the words 'at reasonable hours' in item 3 of para. 1 of Practice Note No. 1 above when calls should be made should not be strictly construed so as to confine such time for calls for service to between 8 am and 5 pm but should be construed as a mere bar to making such calls for service of process at odd hours of the night or early morning ... B C D

[15] In like manner I conclude that on the facts of this case, the fixing of an appointment on a Saturday, a non-working day, rather than during the week does not in itself invalidate the entire order for substituted service. As a consequence of the appointment being fixed on that day, the process server was able to communicate to Ms. Linda who was clearly still in contact with the JD, that service was being attempted and that the JD should contact the process-server's legal firm in view of Ms. Linda's refusal to divulge the JD's address in Taman Tun Dr. Ismail. The attempts at service did or ought to have alerted the JD as to the fact that attempts were being made to serve him with process. This appears to be in substantial compliance with the practice Direction. Accordingly I dismiss the contention that the 'breach' of the PD, ie, fixing an appointment on a Saturday serves to invalidate the entire order for substituted service of the bankruptcy notice. E F G

Ground (c): The Judgment Creditor, Lembaga Kumpulan Wang Simpanan Pekerja ('The JC') Had Failed To Make Attempts To Contact The JD At His Place Of Work Or Business Address H

[16] The JD contends that the JC had not made reasonable efforts to effect service of the bankruptcy notice as they did not try his business address. They further contend that the JC or their solicitors were aware that the JD did not reside at the address at which service of the bankruptcy notice had been effected but nonetheless proceeded to attempt service at that address. They I

made no attempt to contact solicitors on record with a view to effecting service. Neither was any attempt made to effect a search with the Jabatan Pendaftaran Negara. In particular the JD makes the point that the JC was or ought to have been aware of the business address, particularly as the JC is the Employees Provident Fund.

[17] In reply the JC maintains that they did no know the office address of the JD. They maintain that the summons was served personally on the JD at that address, and therefore they continued to attempt service at that residential address. They further contend that the address utilised was based on Form 49 lodged with the companies commission which sets out the particulars relating to the directors of the company. Further they rely on the statements of the process-server who maintained that the JD still came by to collect correspondence from that address.

[18] Having considered the arguments put forth by both parties it seems clear to this court that the attempts at service by the JC were reasonable in all the circumstances of the case. The fact that the JC through its solicitors had previously succeeded in serving the summons at that particular address, coupled with the Form 49 which showed the same address for the JD, amounted to sufficient basis for the attempts at service at that address.

[19] It is true that the JC could have exhibited a greater degree of initiative by seeking the assistance of solicitors to verify the JD's address, but the failure to do so is, in itself, insufficient to invalidate the order for substituted service given the circumstances mentioned. The JD has failed to show any contravention or significant failure or error on the part of the JC which warrants the setting aside of the order for substituted service. Accordingly this ground too fails.

Ground (d): The Sealed Copy Of The Order For Substituted Service Was Not Posted On The Notice Board In Court Or At The JD's Last Known Address: Instead A Photocopy Of The Sealed Copy Of The Order Was So Served. This The JD Contends Amounts To An Irregularity/Flaw That Is Fatal.

[20] In support of this ground, the JD contends that the JC has failed to comply with the requirements of Form 15 in the Bankruptcy Rules. The said Form 15 which relates back to rr. 97 and 110 states in its contents that "... the said petition (or

bankruptcy notice) be served on you by posting copies thereof together with a sealed copy of the Order for substituted service on the notice board of this court at ... shall be deemed to be service of the petition (or bankruptcy notice) upon you; ...". The Form envisages that a sealed copy of the order for substituted service be utilised for the purposes of effecting substituted service of the bankruptcy notice and not a photocopy of the sealed order. It is not in dispute in the instant case that a photocopy of the sealed order rather than the sealed order itself was posted for the purposes of effecting substituted service.

[21] The JC replied to this objection by submitting first that the relevant rule for the purposes of substituted service of the bankruptcy notice was r. 110. Since this rule did not mention the requirement for a sealed copy of the order for substituted service to be annexed to the bankruptcy notice, the MC maintained that the annexation of a photocopy was sufficient compliance.

[22] In considering whether the omission to annex a sealed copy of the order for substituted service together with the bankruptcy notice was sufficient to invalidate the entire substituted service, I am guided by the decision in *Au-Yong v. Dicum & Anor* [1963] 1 LNS 7 an appeal dealt with by Thomson CJ, Barakbah JA and Neal J. In *Au-Yong's* case one of the grounds of appeal was that while sealed copies of the bankruptcy notice were issued to the creditor's solicitors, what was posted on the notice board of the courts were copies of these bankruptcy notices which were made by the petitioner's solicitors and were not signed or sealed with the seal of the court. In the instant case a similar objection is taken, not to the bankruptcy notice itself, but to the order for substituted service, which was a photocopy and not the sealed copy issued by the court. This is what the court said:

> ... It may be, as was thought by the trial Judge, with whom I hasten to say I do not disagree, that the requirement that the copy to be served shall be sealed does not apply where substituted service is ordered and where, as here, the order for substituted service does not specify posting of a sealed copy.
>
> I think however, the matter merits a little further consideration by reason of the case of *Muthiah Chettiar ex parte Ramanathan Chettiar, supra*. In that case a bankruptcy notice was served by exhibiting to the debtor a sealed copy and handing him a copy which was unsealed. Sir Percy McElwaine took the view that this service was not in accordance with the rules then in force in the Straits Settlements (which do not materially differ from those in force here to-day), that the sealing was

not a mere formality and that without the seal on the copy delivered the bankruptcy notice was bad. Consequently the alleged act of bankruptcy, which was noncompliance with the notice, was not an act of bankruptcy and the petition with which he was concerned must be dismissed.

With great respect I am unable to agree that that case should be followed.

In my view, consideration of the question must commence from s. 131 of the Bankruptcy Ordinance which reads as follows:

> No proceeding in bankruptcy shall be invalidated by any formal defect or by any irregularity, unless the Court before which an objection is made to the proceeding is of opinion that substantial injustice has been caused by the defect or irregularity and that the injustice cannot be remedied by any order of that Court.
>
> The section is the same as s. 147 of the English Act of 1914 and it is also the same as s. 128 of the Straits Settlements Ordinance which was in force in Malacca when *Muthiah Chettiar's* case was decided and which apparently was not referred to or considered in that case.
>
> In relation to the application of s. 131 of the Bankruptcy Ordinance there are two questions to be considered. The first is whether what is complained of is an irregularity. If any noncompliance with the requirements of the law goes beyond being a mere irregularity and amounts to something that renders the proceedings a nullity that is, of course the end of the matter and the section has no application. If there is only an irregularity the second question is whether the court is of opinion that in consequence substantial injustice has been caused ...

[23] Applying the foregoing to the present case, it must first be pointed out that the order for substituted service itself does not prescribe that a sealed copy of the order for substituted service is to be annexed to the bankruptcy notice for purposes of effecting substituted service. It is therefore arguable that it cannot be said that there has been a contravention or failure to comply with the terms of that order.

[24] Even if it is said that there has been a breach of Form 15, which is putting the case at its highest, it is evident from the foregoing that the use of a photocopy of the sealed order for substituted service rather than the actual sealed order amounts to an irregularity. It does not render the proceedings a nullity. It then falls upon the court to consider whether a substantial injustice has been caused by the annexation of a photocopy of the sealed order

for substituted service rather than the sealed order itself. There is no evidence of any such substantial injustice. The JD was in no way misled or prejudiced by the fact that the substituted service order was not the sealed copy. Its contents were identical and achieved the same purpose, namely of advising him of the existence and demands in the bankruptcy notice. The substituted service order is in fact ancillary or secondary to the bankruptcy notice. In all these circumstances I find that with the application of s. 131 the 'irregularity' does not have the effect of invalidating the service of the bankruptcy notice, (see also *Re Kamarul Ariffin Mohd Khaidzir ex p Majlis Amanah Rakyat* [2002] 8 CLJ 905).

Ground (e): There Is A Breach Of Rule 97 And 111 Of The Bankruptcy Rules Which Require A Sealed Copy Of The Petition Or Bankruptcy Notice To Be Annexed As An Exhibit To The Affidavit Of Service Of The Bankruptcy Notice.

[25] Rule 97 of the Bankruptcy Rules provides that "A bankruptcy notice shall be served and service thereof shall be proved in the like manner as is by these Rules prescribed for the service of a creditor's petition."

[26] Rule 111 provides that "... (1) Service of the petition shall be proved by affidavit. (2) The affidavit with a sealed copy of the petition annexed and referred to as an exhibit shall be filed in court forthwith after service."

[27] It therefore follows for service of a bankruptcy notice that the affidavit with a sealed copy of the bankruptcy notice is to be exhibited and filed in court after service. The complaint here is that a sealed copy of the bankruptcy notice was not used but instead a photocopy of a sealed copy of the bankruptcy notice was used.

[28] In support of his contention that this defect was fatal, learned counsel for the JD relied on the case of *Raman Chettiar v. Ledchumanan Chettiar* [1938] 1 LNS 60. In that case a bankruptcy notice founded upon a judgment was issued upon a written request sent by post to the Assistant Registrar of the Supreme Court at Seremban. No office copy of the judgment accompanied the request. The debtor applied to set aside the bankruptcy notice on the ground that the office copy of the judgment was not produced to the Assistant Registrar of the court when the notice was issued. On appeal to the Court of Appeal the bankruptcy notice was set aside. It was held that the omission to produce the office copy of the

judgment when the request for issue of the bankruptcy notice was made was a defect which could not be cured by s. 123 of the Bankruptcy Enactment or r. 91 of the Bankruptcy Rules 1969. The court held in that case:

> ... Rule 91 specifically provides that the creditor shall produce an office copy of the judgment when he applies for the issue of a bankruptcy notice the production of the office copy is mandatory and not discretionary, and I do not think that it is for the Courts to speculate why this provision was introduced when it is perfectly clear in its terms and admits of only one Construction ... but I cannot accept the general proposition that a provision which is in its terms mandatory can be disregarded in a procedure which is penal in its nature. For the same reasons I do not think that s. 123 of the Enactment or r. 285 (noncompliance) can be invoked. The jurisdiction to issue the bankruptcy notice is entirely dependent on the strict compliance with terms of r. 91, and to disregard such terms is not a mere formal defect or irregularity which can be cured. In my opinion, therefore the defect is fatal ...

[29] Applying the foregoing, learned counsel for the JD invited the court to conclude that the failure to annex a sealed copy of the bankruptcy notice as an exhibit to the affidavit of service filed in court amounted to a fatal irregularity. It appears to this court that the facts in the case of *Raman Chettiar v. Ledchumanan Chettiar* differ quite considerably from the instant fact matrix. In that case the very basis for the issuance of the bankruptcy notice was not produced in court, thereby throwing doubt on the validity and basis for the bankruptcy notice itself. The judgment was a mandatory pre-requisite for the issuance of a bankruptcy notice, as required by r. 91 (now r. 92). This mandatory pre-requisite had not been complied with and it is evident that in those circumstances the proceedings were rendered a nullity. That is in direct contrast to the present circumstances where the provisions for proof of service of the bankruptcy notice which require a sealed copy of the notice to be exhibited in the affidavit of service cannot be equated with the mandatory provisions of r. 91. The lack of a sealed copy of the notice being annexed to the affidavit of service does not result in the JD being prejudiced in any manner, given the identical nature of the photocopy annexed to the affidavit of service. Again it must be borne in mind that in *Raman Chettiar's* case there was a serious omission in that there was no basis to support the issuance of the bankruptcy notice, which is entirely distinguishable from the case here. Moreover the affidavit of service of the bankruptcy notice is a document that is filed in court to prove service, and not for

purposes of advising the JD of the proceedings. It therefore follows that the error of the JC in annexing a photocopy rather than a sealed copy in the affidavit of service amounts to an irregularity under s. 131 of the Bankruptcy Act as discussed in ground (d) above.

[30] Again it is an irregularity that does not substantially prejudice the JD. As such it does not invalidate the service of the bankruptcy notice. Accordingly this ground also fails.

[31] For the foregoing reasons, the notice of appeal against the order of the learned Senior Assistant Registrar dismissing the judgment debtor's application to set aside the order for substituted service fails. No order as to costs is made.